

COMMUNIQUÉ

To Whom It May Concern

The state election is upon us, so we don't know exactly who to lobby in relation to the law governing land in roads.

But when the dust settles, there will once again be a Minister for Local Government, and a Minister for Planning, and a Minister for Transport, and an Attorney-General (and we still won't know which of them to lobby). Nevertheless...

Here are 25 proposals for policy reform suggested by participants at our 1 November Workshop "Unused, Little-Used and Discontinued Roads."



Roads which are not Public Roads

Of the many roads over which councils have control, not all are 'reasonably required for general public use' and therefore declared to be 'public roads' for the purposes of the *Road Management Act 2004*. Other roads controlled by councils are not public roads, and are consequently omitted from the road register.

Councils may nevertheless have a duty of care under common law in relation to these roads, and may be at risk of negligence actions if they breach that duty of care.

1. *Rather than wait until this duty is tested through litigation, councils need clarification of the nature and extent of their obligations in relation to these roads, and practical guidance on strategies for minimising their risk exposure.*

Public Highways

The concept of the 'public highway' is crucial to identifying those roads for which a council has care and management (section 205, *Local Government Act 1989*), and yet 'public highway' is nowhere clearly defined.

The *Local Government Act* attempts an *inclusive* rather than a *comprehensive* definition; the *Road Management Act* defines the term merely by cross-reference to the common law.

2. *There is a need either for the term 'public highway' to be comprehensively and unambiguously defined by legislation, or for councils' powers and duties to be defined without reference to this term.*

Unused Government Roads

Many roads laid out on Crown land by the early surveyors have never been constructed. They are often declared (under section 400 of the *Land Act 1958*) to be not required for public traffic, and then licensed by DSE to an abutting owner.

3. *A decision by council that a Government road is not required for public traffic should allow council to specify conditions for DSE to attach to the subsequent Unused Road licence. These may be conditions relating to access along the road by (for instance) other abutting landowners, casual users, emergency services, pedestrians or equestrians; or conditions relating to land management and conservation of vegetation. At present there is no recognised mechanism whereby DSE may be given this advice.*
4. *The Land Act test 'not required for public traffic' should be reviewed, because it is now recognised that road reserves serve purposes and have values unrelated to public traffic. A better test may be whether the road is 'suitable for private use under licence.'*
5. *It should be recognised that access may be reasonably required along some licensed roads, but not others. At present there is legal uncertainty about whether an unused road is or is not a public highway – but the more pertinent question is who should be permitted access to an unused road, and in what circumstances. The answer to this question will clearly vary from one case to another.*
6. *Public consultation should be built into any council decision under section 400 of the Land Act. At present there is no formal mechanism for establishing whether abutting owners and other members of the public have a requirement to use the road. Likewise there should be public consultation in the course of deciding whether an unused road is again required for public traffic under section 407.*
7. *A decision by Council (under section 407 of the Land Act 1958) that an Unused Government Road should be re-opened should lead unequivocally to DSE's cancellation of any grazing licence over the road and the road's re-opening. At present this is impeded by use of the word 'may' rather than the word 'shall' in section 407.*
8. *As well as improved processes for roads becoming and ceasing to be 'unused', there should be a mechanism for periodic reviews of past decisions under section 400. Many of these decisions were taken by predecessor councils many decades ago, and the conditions (if any) in the corresponding licence will not reflect current circumstances.*
9. *It should be clearly expressed in legislation that the use of section 400 of the Land Act causes control of a road to transfer from Council to DSE, and that the use of section 407 causes it to revert to council. At present, this change of control is merely inferred from the fact that once a road is declared to be unused, DSE is empowered to issue licences over it.*
10. *An Unused Road licence should run with the title of the property with which it is associated. It should be automatically transferred when the 'parent' title is transferred, and its link to the parent property should be*

continued...

COMMUNIQUÉ - continued

divulged at transfer of the parent property. At present, the nominal licence-holder may be some long-departed past land-owner, and the current owner of the 'parent' title may have no idea of the terms and conditions under which he or she uses the abutting road reserve.

Closures and Discontinuations

There are four commonly-used statutory processes for discontinuing roads. They are found in the *Land Act 1958*, the *Planning and Environment Act 1987*, the *Local Government Act 1989*, and the *Road Management Act 2004*. A fifth but seldom-used process is found in the *Project Development and Construction Management Act 1994*.

The various inconsistencies between these processes reflect, we suspect, the vagaries of history rather than some deliberate set of decisions by the parliament. Although there is no compelling reason to achieve total consistency between these processes, there is a case for certain reforms.

The Local Government Act offers the most robust of these processes, with public exhibition and the open consideration of submissions, and resulting in the issue of title to council.

11. *The ambiguous term 'closure' should be dropped from the Land Act and the Planning and Environment Act, and replaced by the term 'discontinuation.'*
12. *Consideration should be given to allowing independent review of road discontinuation decisions. This is already available for discontinuations under the Planning and Environment Act – but not for the other processes.*
13. *The Land Act process should be modified to allow submissions from parties other than abutting owners.*
14. *The Road Management Act process should be modified to permit the Registrar of Titles to issue title to the municipality, as is the case for discontinuations under the Local Government Act.*
15. *There are serious misgivings about the Road Management (General) Regulations 2005 which purport to allow the discontinuation of an unused Government road without any exhibition or submissions. The future usage and development of nearby land will be affected no less by the discontinuation of a road which is the subject of a declaration under section 400 of the Land Act than by the discontinuation of a road which is not subject to such a declaration. Abutting landowners and other members of the public should not be denied an opportunity of having their views taken into account simply because a road has temporarily been placed under a grazing licence.*

Adverse Possession

Adverse possession is the common law doctrine under which one person may be granted title to another person's land, following 15 years' undisputed possession of that land contrary to the interests of the erstwhile owner.

There may be some policy justification for this doctrine in relation abandoned private freehold, but there is surely no justification for the legalised theft of public land – including roads. In recent times, governments have started protecting public land from adverse possession through a series of amendments to the *Limitation of Actions Act 1958*.

There is still uncertainty about how far this protection extends to roads. The *Road Management Act* contains some rather ambiguously-worded provisions on this matter, which need clarification.

16. *Rather than wait for court interpretation of the Road Management Act 2004, Government should now enact legislative amendment to clearly defeat adverse possession against any road which is a public road for the purposes of the Act. This defence should be available in addition to the various other defences available for roads – e.g. roads which are Crown land, roads which are public highways, and roads which meet the definition of 'council land.'*

Two complimentary amendments to other Acts would further strengthen the powers available to councils in dealing with illegal encroachments:

17. *Firstly, the definition of 'Council Land' in the Limitation of Actions Act should be expanded to include any land which vests in council, irrespective of whether a Torrens title has issued to council for the land. This would give councils the same protection as the Parliament has just given to water authorities.*
18. *Secondly, the Subdivision Act 1988 should be amended to allow Councils to obtain title to pre-1988 subdivisional roads, as section 24A of that Act already provides in relation to pre-1988 reserves.*

Clarity and Certainty

This area of property law is made particularly difficult by complex and/or loose definitions of terms, and unreliable cadastral information.

Too many terms rely on circuitous chains of definitions, inclusive rather than comprehensive definitions, and definitions which rely on the common law. Terms with one definition in one Act may have a different definition in another Act.

19. *In particular, clarity is needed in the definition of the terms 'road' and 'public highway' in both the Road Management Act and the Local Government Act. This would in turn help clarify the meaning of other terms like 'public road' and 'municipal road'.*
20. *Ambiguity would be further reduced by consistent use of the words 'closure' and 'discontinuation' in various Acts.*

In an age of digitised databases, it is also difficult to understand why accessible and reliable data is not available on many aspects of the status of roads:

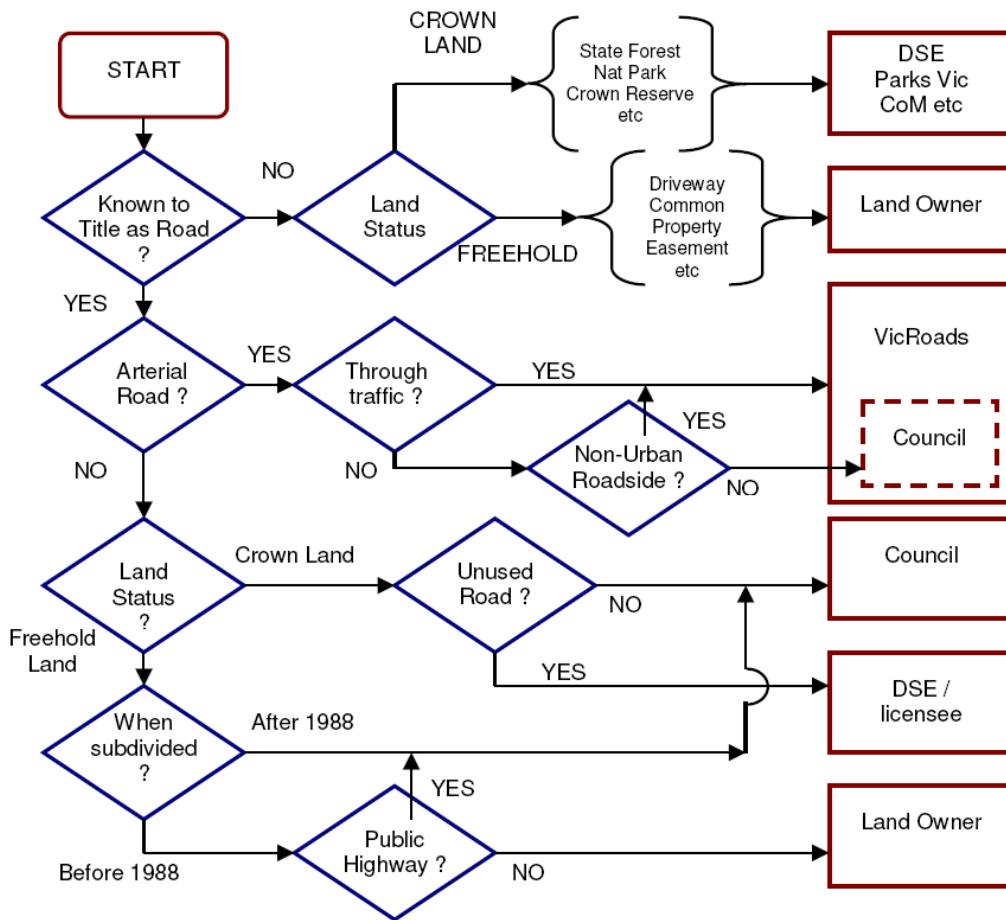
21. *The state's cadastral database should accurately record which land is a road; which of those roads are arterial roads and have therefore become Crown land; and which former roads have been discontinued.*
22. *If the land in a road vests in a council, then that fact should be recorded on title.*
23. *Councils should be able to obtain title to pre-1988 subdivisional roads, in a way parallel to section 24A of the Subdivision Act, which relates to pre-1988 subdivisional reserves.*
24. *Title to land in discontinued subdivisional roads should be issued in the name of council, whether the discontinuation was effected under the Local Government Act or the Road Management Act.*
25. *Information that an unused government road is held under licence by one abutting owner should be readily available to owners and prospective purchasers of other abutting lands.*

We will forward copies of this Communiqué to the incoming Ministers and the MAV



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WHO CONTROLS THIS ROAD ?



Firstly, in what sense is it a 'road'?

- The term 'road' may describe land 'known to title' as road (*i.e.* land whose legal status is road) The term 'road' may also describe a physical roadway
- Some roads are one; some are the other; some roads are both.

If it's a physical roadway, but not on land whose legal status is road (land 'known to title' as road)...

- Physical roadways on Crown land are controlled by whoever controls the Crown land
- Physical roadways on freehold are controlled by the land owner
- (there are several ways in which this control may be contracted out, delegated or assigned)

If the land's legal status is road, and it is an Arterial Road...

- VicRoads for through traffic and non-urban roadsides; the council for everything else

- Council's role is subject to VicRoads' coordination (see sec 37, RM Act and the Code of Practice)

If the land's legal status is road; it's not an Arterial Road; and it is on Crown land...

- Roads on Crown land ("Government Roads") are under the council's care and management – sec 205(1)(c), LG Act
- Exceptions: Unused Roads (*i.e.* roads subject to sec 400, Land Act); strata above and below the trafficked surface

If the land's legal status is road; it's not an Arterial Road; and it is on freehold land...

- New subdivisions:– Roads vest in council on registration (sec 24(2)(b) Subdivision Act)
- Old subdivisions:– Roads vest in council if they are Public Highways (sec 203(1) LG Act (now repealed); Schedule 5, RM Act)

This chart outlines the control of roads – it does not deal with the management responsibilities of the controlling entity. For that, you need to apply a further test: is the road a 'public road' for the purposes of the *Road Management Act 2004*?

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THURS 30 NOVEMBER
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TUES 28 NOVEMBER
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TUES 5 DECEMBER
CITY OF BOROONDARA

Monday 4 December 2006
5:30 pm – 7:00 pm
Law Institute of Victoria
470 Bourke Street
Melbourne



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Victoria

“Off the Title”

Your Client's Title Boundary Need Not Be a Brick Wall

Legal Update – 1.5 CPD Units

Overview

A detailed overview of the law relating to the use and occupation of road reserves and other public land. Practitioners will gain a practical understanding of the ways in which encroachments across title boundaries can be legally authorised, and the consequences of them not being legally authorised. Tips and advice on how to advise clients to legally occupy and use Road Reserves and Other Public Land will be provided.

Topics

- The status and control of public land – both Crown land and freehold
- Use and occupation of road reserves – both at the surface and at stratum
- Use and occupation of parks, reserves, river frontages and foreshores
- The various consents required *in addition to* planning consents
- Unauthorised encroachments and recent changes to the law of Adverse Possession
- Risk arising from failure to comply with the law relating to public land.

Speakers

David Gabriel-Jones

David is the Principal of The Public Land Consultancy, which provides advice and support to managers and users of public land including many municipalities, government agencies and private sector developers. Before establishing the Consultancy, David had 18 years experience in the Victorian Department of Sustainability & Environment and its predecessors. He served as a Ministerial adviser to the Cain and Kimer Governments, and holds qualifications in Public Policy and Civil Engineering.

Jennifer Huppert

Jennifer is Special Counsel in the Property, Construction and Major Projects Group at Maddocks. Jennifer's experience includes acting for local governments in property projects, property redevelopment projects, negotiating and drafting contractual documentation for acquisitions and dispositions of property and commercial and retail leasing.

Who should attend

All property and commercial lawyers acting for property developers, local government, surveyors and strategic planners.

When

Monday, 4 December, 5.30-7pm
Registration from 5.15pm

Where

Law Institute of Victoria
470 Bourke Street, Melbourne

Cost (All prices are GST inclusive)

\$115 LIV members
\$230 Non members
Includes: seminar paper, tea/coffee or teleconferencing

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